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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No.

BLACK DIAMOND LINES, INC. and TAMPA INTER-OCEAN STEAMSHIP COMPANY,
Petitioners (Respondent-Appellant and Claimant-Appellant below),

against

PIONEER IMPORT CORP.,
Respondent (Libellant-Appellee below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that Court entered on February 7, 1947, (R. 694) modifying a final decree of the United States District Court for the Southern District of New York, entered in favor of the respondent, and affirming the decree as so modified.

Jurisdiction.

The date of the decree of the Circuit Court of Appeals to be reviewed is February 7, 1947 (R. 694). On February 21, 1947, the respondent filed a petition for a rehearing

limited to the point as to which the decree was modified, and the petition was denied on February 27, 1947 (R. 695-700). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. § 347(a) and under General Rule 38 of this Court, § 5, subdivision (b).

Statement.

This is a suit against the steamer *Lafcomo* and her charterer, Black Diamond Lines, Inc., to recover for damage to a shipment of lily of the valley pips, hereafter, for brevity, called "pips". (The pip is the part of the plant which contains the flower bud and the leaves and it is attached to fibrous roots.) A stipulation for value was posted by Tampa Inter-Ocean Steamship Company, as owner of the *Lafcomo*. Whenever necessary, the petitioners will be called "Black Diamond" and "Tampa".

The *Lafcomo* and Black Diamond were both held liable for the damage, ultimate liability being imposed upon Black Diamond. *Pioneer Import Corp.* v. *The Lafcomo, et al.*, 49 Fed. Supp. 559 (S. D. N. Y.); affirmed, *Pioneer Import Corp.* v. *The Lafcomo,* 138 Fed. (2d) 907 (C. C. A. 2). Certiorari was denied, 321 U. S. 766.* The present petition relates solely to damages.

The pips were first booked at Rotterdam in November, 1939, with Holland America Line for carriage under refrigeration on the steamer *Statendam.* The British Government, however, announced that an embargo on German goods was about to be imposed, and the Holland America Line, fearing complications, cancelled the booking (Van Noort, T. R. 609, 610). No vessels with refrigerated space were available, so the respondent, which was anxious to get

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Page references to the first record will be preceded by "T. R." and references to the Exhibit Booklet used on the two appeals will be indicated by a "B". Otherwise all page references are to the present record.

the pips out of Holland before the embargo, chose to ship them without refrigeration.

The pips were booked with Black Diamond on November 25, 1939, for carriage on the *Lafcomo* from Rotterdam to New York. The respondent's agents, Van Es & Co., insisted that they be stowed on deck, although under deck stowage was available and was tendered (Hollaar, Dir. Int. 17, T. R. 658; Van Noort, Cross Ints. 29, 30, T. R. 618). The pips accordingly were stowed on deck and an "on deck" bill of lading was executed by Black Diamond's agents and delivered to Van Es & Co. (Finding 26, T. R. 934, 935; Ex. 7, T. R. 878).

The *Lafcomo* left Rotterdam on November 29th and arrived at New York on December 16, 1939. When the pips were discharged they were found to be wet with salt water. The damage was so extensive that it was found to be commercially unprofitable to try to grow and market the pips, so the shipment, except for a small part used in growing tests, was destroyed.

One issue at the trial was whether it was contemplated that the pips were to be covered with tarpaulins, as requested by the shipper's agents when making the booking over the telephone. The petitioners contended that the request was withdrawn after the danger of using tarpaulins was pointed out. This issue, however, was decided against the petitioners.

After the litigation on the merits was ended the questions of damages were submitted to a Special Commissioner (T. R. 947, 948).

Clause 16 of the bill of lading (R. 672) limited the carrier's liability to the invoice value of the goods. The respondent paid for the pips with 190,858.75 German marks, one-half of which were free reichsmarks and one-half blocked marks of the type called "Vorzugssperrguthaben" (Their colloquial name is "Altbesitz", meaning "old pos-

session" marks, and we shall use that term for brevity.) (R. 442, 577, 578). The petitioners therefore contended that their liability was limited to 190,858.75 marks, half free and half blocked, and that they must be converted into dollars at their current New York selling rates in December, 1939, making the invoice value $41,337.62.

Another question involved was whether these pips, carried without refrigeration, were as valuable as pips transported refrigerated and, if not, how much of a discount in value there should be.

Decisions Below.

The Commissioner held that Clause 16 was a valid limitation, and that the petitioners committed no breach of the contract which deprived them of its benefit; that the blocked marks were purchasable in New York at 3¢ to 3½¢ per mark, but that all the marks should be converted at .4033 per mark, as provided by the proclamation by the Secretary of the Treasury, dated October 1, 1939, giving that rate as the one to be used in customs declarations. On that basis invoice value worked out at $76,973.34. The Commissioner found that the New York market value of refrigerated German pips at the time was $22.50 per 1000, on which basis this shipment would be valued at $71,212.50. But he also found that unrefrigerated pips were inferior to refrigerated pips and discounted their value by 20%, thus fixing their market value at $56,970 (R. 607-619).

The District Court, on exceptions to the Commissioner's report, held Clause 16 invalid for lack of a choice of rates, following *The Merauke*, 31 Fed. (2d) 974 (C. C. A. 2), and *Kilthau* v. *International Mercantile Marine Co.*, 245 N. Y. 361; also, that the petitioners' failure to cover the pips with tarpaulins, as agreed, was a fundamental breach of the contract of carriage and hence a deviation, which de-

prived them of the benefit of Clause 16, under *The Sarnia*, 278 Fed. 459 (C. C. A. 2), and *The St. Johns, N. F.*, 280 Fed. 553 (C. C. A. 2), affirmed 263 U. S. 119. It also reversed the Commissioner's finding that the market value of the pips was $56,970. and placed it at $71,212.50 (R. 630-638). *The Lafcomo*, 64 Fed. Supp. 529 (S. D. N. Y.).

The Circuit Court of Appeals, whose opinion has not yet been officially reported, held that the contract of carriage called for stowage with tarpaulins and that by failing to cover the pips with tarpaulins the petitioners deviated fundamentally from the agreed method of transportation and therefore, under *The Sarnia* and *The St. Johns, N. F.*, *supra*, were deprived of the benefit of Clause 16. It restored the Commissioner's 20% discount, and modified the decree accordingly, affirming it as so modified (R. 691-694).

Questions Presented.

1. Where a shipper of cargo by steamer instructs the carrier to stow it on deck and the carrier does so and delivers to the shipper an "on deck" bill of lading for it, is it a deviation to fail to cover the cargo with tarpaulins, as orally requested by the shipper when it was booked?

2. Is this case governed by the decisions in *The Sarnia* and *The St. Johns, N. F., supra*?

3. Is it proper to apply the deviation doctrine to a case involving damage to cargo through ordinary negligence of the carrier?

4. Was not the sole contract for the carriage of this cargo the bill of lading?

5. Since the bill of lading contained no provision that the pips were to be covered with tarpaulins, was the ante-

cedent alleged oral understanding as to their use a part of the contract of carriage?

6. Was the decision below, construing the alleged prior oral understanding as to tarpaulins to be a part of the contract of carriage, in conflict with the decisions of this Court in *The Delaware*, 14 Wall. 579, 603, 604, and *The Thames*, 14 Wall. 98, 105?

7. Would the fact that the shipper's agents, after the booking of the cargo, drew up a so-called loading permit which noted that the cargo was to be covered, have the effect of enlarging the contract of carriage as expressed in the bill of lading?

8. Was not the so-called loading permit in any event merged in the bill of lading?

9. Is Clause 16 of the bill of lading a valid and enforceable invoice limitation clause?

10. If Clause 16 is valid, is the petitioners' liability thereby limited to 190,858.75 German marks, half free and half blocked?

11. Was inquiry into the invoice value of the pips foreclosed by the trial Court's so-called Finding 55 (T. R. 943) as to the Rotterdam cost of these pips?

12. Is the respondent now estopped from attacking Clause 16 because of its counsel's previous apparent reliance thereon?

13. What is the proper basis for converting into dollars the free German reichsmarks and the Altbesitz marks stated in the invoices? Is it the pre-war free mark rate or the selling rates on these two classes of marks at New York as of December 16, 1939?

14. Did the Commissioner decide correctly in converting the free and blocked marks into dollars at the rate of .4033 per mark, on the basis of a proclamation of that rate for customs purposes by the Secretary of the Treasury on October 1, 1939?

15. Did the Altbesitz marks, in any event, come within the proclamation of the Treasury Department?

16. Was the holding of the Commissioner as to the applicable rate of exchange contrary to this Court's decision in *Barr* v. *United States,* 324 U. S. 83?

17. Was the dollar equivalent of the two classes of marks stated in the invoices $41,337.62 as of December 16, 1939?

18. Should the petitioners' liability be limited to $41,337.62?

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:—

1. In holding that the petitioners, by failing to cover the pips with tarpaulins, committed a deviation which deprived them of the benefit of the limitation in Clause 16 of the bill of lading.

2. In holding that there was a deviation here in the face of the fact that the goods were stowed on deck by agreement and that an "on deck" bill of lading was issued therefor.

3. In holding this case to be governed by *The Sarnia,* and *The St. Johns, N. F., supra.*

4. In holding this case to be within the deviation doctrine, the damage complained of having been caused by ordinary negligence of the petitioners.

5. In holding that the contract of carriage called for stowage with tarpaulins.

6. In failing to hold that the contract was the bill of lading and that since it contained no provision as to the use of tarpaulins any antecedent oral references to tarpaulins were not a part of the contract of carriage.

7. In failing to hold that any antecedent oral understanding and any memorandum of the shipper with respect to tarpaulins were merged in the bill of lading.

8. In failing to follow this Court's decisions in *The Delaware* and *The Thames, supra,* and to hold that the contract of carriage was the bill of lading.

9. In failing to hold that the respondent is estopped from claiming a deviation now after having failed to make any such claim at the trial and having then apparently invoked Clause 16 in its own behalf.

10. In failing to hold that Clause 16 is valid and enforceable, and that the petitioners' liability thereunder is limited to the invoice value of the pips.

11. In failing to hold that inquiry into invoice value was not barred by so-called Finding 55 of the trial Judge.

12. In failing to reverse the Commissioner's holding that the invoice value of the pips was $76,973.34.

13. In failing to hold that the proclamation of the Secretary of the Treasury of October 1, 1939, fixing .4033

as the conversion rate on German marks for use on customs declarations, did not control as against the lower current selling rates on marks in the New York market.

14. In failing to hold that the Altbesitz marks did not come within the Treasury proclamation in any event.

15. In failing to follow *Barr* v. *United States*, 324 U. S. 83.

16. In failing to hold that the selling rates on free marks averaged .4013 per mark and those on Altbesitz marks averaged .031875 per mark at New York on or about December 16, 1939.

17. In failing to fix the dollar invoice value of the pips at $41,337.62 on the basis of the aforesaid selling rates and to limit the petitioners' liability to that figure.

Reasons for Granting the Writ.

1. The Court below, in holding that the petitioners committed a deviation under the facts of this case, has set up a new doctrine of deviation, far beyond anything hitherto decided, and in so doing has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The Court below, in holding that *The Sarnia* and *The St. Johns, N. F., supra*, apply to this case, has improperly extended the previously prevailing deviation doctrine and its decision should therefore be passed on by this Court.

3. The decision below is erroneous in applying the deviation doctrine to a case where the cargo damage involved was caused by ordinary negligence on the part of the carrier.

4. The decision below, in depriving the petitioners of the benefit of Clause 16 because of their failure to cover the pips with tarpaulins, is in conflict with previous decisions of the lower Court in which it held claim and limitation clauses in bills of lading enforceable even though the ship had been proven unseaworthy or there had been a misdelivery of the goods. *The West Arrow,* 80 Fed. (2d) 853 (C. C. A. 2); *The J. L. Luckenbach,* 65 Fed. (2d) 570 (C. C. A. 2); *W. R. Grace & Co.* v. *Panama R. Co.* 12 Fed. (2d) 338 (C. C. A. 2); and *Bank of California, N. A.* v. *International Mercantile M. Co.,* 64 Fed. (2d) 97 (C. C. A. 2).

5. The Court below, in nullifying Clause 16, has rendered a decision which is in probable conflict with the decisions of this Court in *Davis* v. *Roper Lumber Co.,* 269 U. S. 158, *American Railway Express Company* v. *Levee,* 263 U. S. 19, and *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190, wherein claim and limitation clauses were held enforceable notwithstanding a misdelivery of the goods.

6. The decision below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Manby* v. *Union Pac. R. Co.,* 10 Fed. (2d) 327, where the Court enforced a notice clause in the bill of lading although the carrier had misdelivered four carloads of sheep.

7. The decision below, in holding that the contract of carriage called for stowage with tarpaulins, when the bill of lading contained no reference thereto, is in conflict with this Court's decisions in *The Delaware,* 14 Wall. 579, 603, 604, and *The Thames,* 14 Wall. 98, 105.

8. The Court below, in seemingly holding that the so-called loading permit was not merged in the bill of lading, has rendered a decision which is in conflict with the de-

cisions of this Court in *The Caledonia,* 157 U. S. 124, 15 Sup. Ct. Rep. 537, and the Circuit Court of Appeals for the Fifth Circuit in *Strachan Shipping Co.* v. *Alexander Eccles & Co.,* 25 Fed. (2d) 361.

A writ should be granted for the following further reasons, as the questions below listed, although not decided by the lower Court, are directly involved in the case.

9. The District Court's holding that Clause 16 was invalid because it was not supported by a choice of rates is clearly erroneous.

10. The Commissioner's holding that .4033 was the proper rate of exchange to use in converting the marks into dollars is in conflict with *Barr* v. *United States,* 324 U. S. 83, and *Edmond Weil, Inc.* v. *Commissioner of Internal Rev.,* 150 Fed. (2d) 950, 951 (C. C. A. 2).

11. The Commissioner, in holding that the Altbesitz marks should be converted at the pre-war free mark rate of .4033 on the basis of a Treasury proclamation, has decided an important question of federal law which either has been decided to the contrary in the *Barr* case, *supra,* or, if not, should be settled by this Court.

12. The Commissioner's holding that the Altbesitz marks had the same conversion value as the free reichsmarks is in evident conflict with the decision of the Court of Customs and Patent Appeals in *F. W. Woolworth Co.* v. *United States,* 115 Fed. (2d) 348.

13. The questions involved are of general interest and public importance.

WHEREFORE, your petitioners, referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of

certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed or modified, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, April 3, 1947.

BLACK DIAMOND LINES, INC. and
TAMPA INTER-OCEAN STEAMSHIP COMPANY,
Petitioners.

By—JOHN W. CRANDALL,
ARTHUR M. BOAL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioners' first point deals with the deviation question (pp. 13-16). The second point discusses the validity of Clause 16 (pp. 16-18). The third point is directed to the foreign exchange question, which involves a determination of the correct basis for converting the marks into dollars (pp. 18-25). The fourth point stresses the importance of the questions presented (pp. 25, 26).

POINT I.

The Court below, in holding that the petitioners committed a deviation which deprived them of the benefit of Clause 16, has set up a new doctrine of deviation, the correctness of which should be determined by this Court.

There is a great difference, we believe, between this case and *The Sarnia* and *The St. Johns, N. F., supra,* which the lower Court thought were controlling on the question of deviation. There the carriers issued clean bills of lading, which imported stowage under deck. By stowing the goods on deck they committed a fundamental breach of the contract. Here, the shipper demanded stowage on deck and an "on deck" bill of lading was issued and delivered (Ex. 7, T. R. 878).

The lower Court, however, held that "the contract of carriage * * * called for stowage with tarpaulins, not without" and that the failure to use tarpaulins was a

deviation (R. 692). But it was the bill of lading which was the contract, *The Delaware, supra, The Thames, supra, Dietrich* v. *U. S. S. B. E. F. C.*, 9 Fed. (2d) 733, 741 (C. C. A. 2), and it said nothing about tarpaulins.

The alleged understanding about tarpaulins was based on a telephone talk between representatives of the parties when the cargo was booked. But clearly that conversation was not a part of the contract, although it doubtless was pertinent to the negligence issue. This Court held in *The Delaware,* where a clean bill of lading was issued, that parol evidence was inadmissible to prove a prior agreement for deck stowage. It is a poor rule that does not work both ways. The alleged parol agreement here likewise cannot be a part of the contract.

The fact that the shipper's agents, following the booking, drew up a so-called loading permit (Ex. A., T. R. 897) which noted that the pips were to be covered, is immaterial. That was a purely *ex parte* act. Black Diamond did not issue the permit and, moreover, the reference to covers in the permit was not incorporated in the bill of lading. In short, the permit was merged in the final contract, which, incidentally, was prepared by the respondent's shipping agents themselves. Finding No. 14 (T. R. 931). *The Caledonia,* 157 U. S. 124, 15 Sup. Ct. Rep. 537; *Strachan Shipping Co.* v. *Alexander Eccles & Co.*, 25 Fed. (2d) 361 (C. C. A. 5). The merger point was, in fact, directly involved in *The St. Johns, N. F.* There the freight contract gave the ship-owner the option of carrying the goods on or under deck, but this option did not appear in the bill of lading. If it had there would have been no question as to the carrier's right to stow the cargo on deck.

Assuming, for argument's sake, that the present contract did provide for tarpaulins, the Court's holding that the petitioners' failure to use them vitiated Clause 16 goes counter to many decisions in analogous cases. For

example, the lower Court has upheld claim clauses where the loss of cargo was due to the ship's unseaworthiness. *The West Arrow*, 80 Fed. (2d) 853 (C. C. A. 2); *The J. L. Luckenbach*, 65 Fed. (2d) 570 (C. C. A. 2); and *W. R. Grace & Co.* v. *Panama Railroad Co.*, 12 Fed. (2d) 338 (C. C. A. 2). Also, in *Bank of California N. A.* v. *International Mercantile Marine Co.*, 64 Fed. (2d) 97 (C. C. A. 2) the Court refused to extend the *Sarnia* rule to the case of a misdelivery of a shipment of salmon. It reversed the District Court which had held, 40 Fed. (2d) 78, that the misdelivery went to the essence of the contract and vitiated the claim and valuation clauses therein. This Court also has held claim clauses enforceable in spite of the carrier's misdelivery of the goods. *Davis* v. *Roper Lumber Co.*, 269 U. S. 158; *American Railway Express Company* v. *Levee*, 263 U. S. 19; *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190; see also, *Manby* v. *Union Pac. R. Co.*, 10 Fed. (2d) 327 (C. C. A. 8).

It is contended that the test of a deviation is whether a carrier has "broken its own contract and exposed the goods to greater risk than has been agreed and thereby directly caused the loss." But this cannot be the true test, for in virtually all cases where cargo has been damaged through the carrier's fault it has been exposed to greater risks than the contract contemplated. We cite the following illustrations: Leaving a hatch open for ventilation, *Andean Trading Co.* v. *Pacific Steam Nav. Co.*, 263 Fed. 559 (C. C. A. 2); failure to close a ventilator lid, *W. T. Lockett Co.* v. *Cunard S. S. Co.*, 21 Fed. (2d) 191 (E. D. N. Y.); stowing different kinds of cargo so close together that one damages the other, 58 Corpus Juris, § 746, page 452; and a breach of the warranty of seaworthiness resulting in damage. Never has it been thought that such cases were deviations.

The present case, in the last analysis, is one for damage due to ordinary negligence. The libel alleges negli-

gence (Art. Seventh, T. R. 8) and the trial Court's finding of liability was based on negligent stowage (T. R. 922, 926). No claim of deviation was raised at the trial. It was first raised before the Commissioner (R. 410, 411) after the case had gone through two Courts. Whether the respondent is estopped from claiming a deviation now, under this Court's decision in *People of Illinois* v. *Campbell,* 91 Law Ed. 272 (No. 35, Oct. Term, 1946), will be considered in the next point (p. 18).

Because of the far reaching importance of the lower Court's decision as to deviation and the serious doubts as to its soundness we submit that it should be reviewed on certiorari.

POINT II.

The lower Court erred in failing to reverse the District Court's decision that Clause 16 was invalid for lack of a choice of rates.

The questions discussed in this and the next points were not passed on by the Circuit Court of Appeals because of its holding as to deviation. This Court, however, has held that the granting of a writ of certiorari brings the entire record before it, with power to decide the case as it was presented to the Circuit Court. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267; *Delk* v. *St. Louis and San Francisco Railroad Co.,* 220 U. S. 580, 588; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers Co.,* 240 U. S. 251, 258; *Camp* v. *Gress,* 250 U. S. 308, 318; *Langnes* v. *Green,* 282 U. S. 531, 536; and *Story Parchment Company* v. *Paterson Parchment Paper Company,* 282 U. S. 555, 567, 568. The present point is covered by assignments of error 4-9 (R. 644, 645).

Clause 16 is set forth on page 672 of the record. The Commissioner and the District Court held it to be a limi-

tation clause, *Smith* v. *The Ferncliff*, 306 U. S. 444, and *The Ansaldo San Georgio I* v. *Rheinstrom Brothers Co.*, 294 U. S. 494, and that the applicable limitation was invoice value (R. 632, 611). Since the Carriage of Goods By Sea Act, 46 U. S. C. A. § 1301(c), excludes deck cargo, any restrictions on limitation provisions therein do not apply to this case.

Black Diamond's Tariff No. 7 (Ex. J, R. 674, 675) contained a regular flower bulb rate and also an *ad valorem* rate (R. 256, 257). The Commissioner held that a choice of rates appeared on the face of the bill of lading (R. 611), we having cited to him *Cincinnati & Tex. Pac. Ry.* v. *Rankin*, 241 U. S. 319, 327; *Adams Express Company* v. *Croninger*, 226 U. S. 491, 508, 509; *Hart* v. *Pennsylvania R. Co.*, 5 Sup. Ct. Rep. 151, 154 (112 U. S. 331) and other cases. The District Court found that the tariff contained alternative rates but held that there was in effect only one rate for these pips, as in *The Merauke* and *Kilthau* cases, *supra*, saying that it was not disputed that the value of the pips did not exceed invoice value (R. 632). The statement is incorrect. No such concession was made. On the contrary, the question as to dollar invoice value was one of the principal matters in dispute.

The fixing of the invoice value depends upon what dollar values are placed on the marks (*infra*, pp. 19-25). If the invoice value was $41,337.62 there was a clear choice of rates, for the Commissioner found market value to be $56,970. If, however, invoice value actually was $76,973.34, as the Commissioner fixed it (R. 615), the various matters raised herein would be academic. The Court was not in a position to say that market value did not exceed invoice value when it failed (R. 638) to pass on our exceptions 10-21 to the Commissioner's holding as to invoice value (R. 621-623). The *Merauke* and *Kilthau* cases are not controlling because both shipped and arrived values there were below the $100. package limitation. Here, if the

marks are valued at what we believe to be the proper rates, there was a very definite choice of freight rates.

There is a serious question, moreover, whether the respondent is not estopped by the previous conduct of its counsel from questioning the validity of Clause 16 or raising the deviation question at this stage. After the trial, counsel asked the Court for a final decree for the alleged invoice cost of the goods and cross-assigned error when the request was denied (T. R. 968). This demand involved at least an implied representation, however mistaken, that Clause 16 was a valid valuation clause which fixed invoice value as the measure of damages, for invoice value would not be the standard unless there was an agreement making it so. In *People of Illinois* v. *Campbell, supra,* the State of Illinois, in its complaint on which a receiver for the debtor was appointed, alleged that the debtor was insolvent. Before this Court it sought to take a contrary position and was held estopped from doing so. A similar estoppel should be enforced against the respondent with respect to Clause 16.

It is therefore respectfully requested that this Court also review and decide the questions presented in this point in the event that a writ of certiorari is granted.

POINT III.

The lower Court erred in failing to hold that the invoice value of the pips was $41,337.62, and to limit the petitioners' liability to that figure, as provided by Clause 16.

This point was presented to the District Court by our exceptions to the Commissioner's report 10-18 and 21 (R. 621-623) and to the Circuit Court by assignments of error 20-33 (R. 647-649).

The term "invoice value" means the amounts written into the invoices as of the time of shipment. *Anchor Line* v. *Jackson*, 9 Fed. (2d) 543 (C. C. A. 2). The amounts written into the respondent's invoices were German marks, half free and half blocked.

The respondent has claimed that inquiry into this question is foreclosed by the trial Court's Finding 55 that the Rotterdam cost of the pips was $76,973.34 (T. R. 943). The answer to this contention is that the trial was confined to the merits of the case, there being no suggestion from the Court or stipulation of counsel that the *quantum* of damages be litigated also. The figure $76,973.34 was based on the rate of .4033. The respondent's counsel, as it later developed, took the figures from the respondent's warehouse entries and put them into a proposed finding. The Court, over our protest, incorporated them in Finding 55, with no evidence whatever on exchange values and no concession as to the correctness of the figures. The so-called finding is therefore either a nullity or an *obiter dictum*, and without any force in proceedings to assess damages. The *Ship Shand*, 4 Fed. 925, 926 (S. D. N. Y.); see also, *Baumgartner* v. *United States*, 322 U. S. 665, 670. The Commissioner correctly ruled that the "finding" did not bind him (R. 51-53, 58, 59).

When the German inflation following World War I was ended in 1924, the dollar exchange rate on the new German reichsmark was .2381, Germany and the United States then being on the gold standard. When the United States went off the gold standard in January, 1934, the gold rate on the free German reichsmark rose to .4033, where it remained until the outbreak of World War II (Beer, R. 388, 393, 394).

Germany commenced the regulation of foreign exchange in July, 1931, after the failure of the Darmstaedter Bank. Following a two-week Bank Holiday, an embargo was placed

on foreign exchange, which prevented payments abroad in German marks or gold without a license from the German Foreign Exchange Office (Beer, R. 383-394). When the exchange control restrictions were applied, persons residing in Germany were classed as "Devisen Inlanders", and persons outside of Germany, whether German nationals residing abroad or foreigners, were classed as "Devisen Outlanders". After the Bank Holiday, all German marks owned by Devisen Outlanders were blocked and no Outlander could thereafter dispose of such funds without a license from the German Foreign Exchange Office. Devisen Outlanders could maintain accounts only with Devisen Banks, which were designated by the German Reichsbank.

Before July, 1931, every German mark was a free mark. After that time, however, free reichsmarks were only those which were created out of fresh funds, in the form of foreign exchange or gold, brought into Germany by Devisen Outlanders and deposited in Devisen Banks. These free reichsmarks were under no restrictions whatever and were convertible in Germany into sterling or any other exchange, and could be sold against dollars in the New York market. So far as German Inlanders were concerned, however, there were no "free marks" after July, 1931, all marks possessed by them being simply German reichsmarks, with an internal value only (Beer, R. 386-388, 413, 574-577; Gareiss, R. 435, 436). The only persons who could have free reichsmarks were Outlanders (Gareiss, R. 453).

Before January 1, 1939, there were many categories of blocked marks. From then on, however, the categories were reduced to six, in one of which were the blocked marks or preferred blocked credits called "Vorzugssperrguthaben" and colloquially known as "Altbesitz" marks (*supra*, pp. 3, 4) (Gareiss, R. 431-442; Beer, R. 577, 578). This was the type of blocked mark with which the respondent paid half of the purchase price of the pips. Altbesitz

marks consisted of funds owned by an Outlander and on deposit with a Devisen Bank, provided that such funds had been credited to the Outlander out of the liquidation or sale of capital assets, such as real estate mortgages, owned by the Outlander before July 15, 1931. These marks could be used by an Outlander to buy German goods for export, if the consent of the German Foreign Exchange Office was procured in each case and a part of the purchase price paid with foreign exchange or free marks (Beer, R. 388-391).

The respondent's use of the Altbesitz marks was by permit of the German Foreign Exchange Office, dated November 15, 1939, which stipulated that 50% of the invoice amounts must be paid in freely available foreign exchange (Ex. 21, R. 665-667). These marks were in the blocked account of International Mortgage & Investment Corp. of New York (hereafter called "International"), the respondent's parent company, and represented an investment in German mortgages (Ex. 14, R. 657-660). The commercial and consular invoices (B. pp. 48-76) are in the same general form so we refer to the first set as typical. The commercial invoice (p. 50) was made out by Eurotank Handelgesellschaft M. B. H. (hereafter called "Eurotank"), an oil company (Beer, R. 580, 581), and the price is billed half in free reichsmarks and half in Altbesitz marks. The debit advices (pp. 48, 49) issued by Reichs-Kredit-Gesellschaft show the same division.

Should Clause 16 be upheld, the petitioners' liability is limited to invoice value, stated in free marks and Altbesitz marks, which must be expressed in terms of dollars in the final decree. *Liebeskind* v. *Mexican Light & Power Co. Limited,* 116 Fed. (2d) 971, 974 (C. C. A. 2). The breach of the carrier's obligation having occurred at New York, *The West Arrow,* 80 Fed. (2d) 853, 858 (C. C. A. 2), the exchange value of the marks must be taken as of December 16, 1939, the date of the vessel's arrival. *Hicks* v. *Guin-*

ness, 269 U. S. 71, 80. See also, *Guinness et al.* v. *Miller,* 299 Fed. 538, 540 (C. C. A. 2), and *Sutherland* v. *Mayer,* 271 U. S. 272, 295.

The Commissioner, as we have said, took the .4033 rate for all the marks, in reliance on the Treasury proclamation of October 1, 1939 (R. 612, 613, 615). This proclaimed rate, however, was above the New York selling rates on free marks and far above those on Altbesitz marks in December, 1939. Moreover, the proclaimed rate was the prewar gold rate (Beer, R. 388), 31 U. S. C. A. § 372, and so did not include blocked marks in any case.

When World War II broke out on September 1, 1939, the free rate fell below the gold point because the German Reichsbank could no longer support it by gold shipments to New York. It ranged from .4010 to .4016 between November 15th and December 1st (Beer, R. 404).

In *Barr* v. *United States,* 324 U. S. 83, Barr imported into New York from England woolen fabrics which he paid for with pounds purchased in New York through the Guaranty Trust Company. The British Treasury proclaimed $4.035 as the official rate on pounds sterling, but they were selling in the New York market at the "free" rate of $3.475138. The Federal Reserve Bank of New York, acting under 31 U. S. C. A. § 372(c) certified both rates to the Secretary of the Treasury. The Secretary, however, published only the "official" rate and directed the Collectors to use that rate for assessing and collecting duties. The New York Collector therefore converted the pounds into dollars at the "official" rate. Barr claimed that the conversion should have been made at the "free" rate. This Court held (p. 94) that the use of the "official" rate in assessing and collecting duties on the imports transcended the authority of the Collector and the Secretary, and that the "free" rate certified by the bank should have been used.

As for the Altbesitz marks, the rate applied by the Commissioner was over 13 times their market value in December, 1939. Blocked marks of all kinds, because of their limited utilization possibilities, sold at a heavy discount with relation to free marks in New York (Gareiss, R. 449, 450; Moosbrugger, R. 83). See also the excerpt from the publication issued by the Commerz-Und Privat-Bank in Berlin (R. 449).

An owner of an Altbesitz mark credit in Germany could not use it, except for traveling in Germany or for gifts, or for part payment of German goods provided he obtained permission from the German Government (Beer, R. 389-391; Gareiss, R. 459). To cut down his loss he was forced to get rid of his blocked marks as best he could. Any sale involving the use of these marks was therefore simply a salvage operation (Beer, R. 401, 402; Gareiss, R. 452, 453). The salvage nature of the present transaction is shown by the fact that it was, in effect, one between an oil company (Eurotank) and a mortgage and investment company (International) (Beer, R. 580, 581).

The sales value of Altbesitz marks on the New York market should constitute their exchange value. Altbesitz holdings were frequently liquidated here. Altbesitz marks, however, retained their identity as "old possession" marks only while in the hands of the original owner. The breaking of the continuity of possession by a transfer transformed them into Handelssperrmarks (Beer, R. 395, 396-402; Gareiss, R. 444, 445, 461). Handelssperrmarks, which were blocked trading marks, could be used in several ways but not for the purchase of German goods (R. 467). The liquidation value of Altbesitz marks thus was measured by the selling price of Handelssperrmarks, which ranged from 2⅞¢ to 3½¢, or an average of .031875 per mark at New York in November/December, 1939 (Beer, R. 402; Gareiss, R. 451).

The respondent's claim that the .4033 rate applies to the Altbesitz marks is based on the peculiar German currency regulations under which an Outlander could use depreciated blocked marks in part payment for German goods, while the Inlander seller, because of the Government's release of the restrictions on the marks when the deal was consummated, would receive a total number of marks with the same value to him as if they all had been free marks originally (Beer, R. 575-577). It is therefore argued that since the Inlander got marks which were all of equal value to him inside Germany, they must all be treated as of equal value when in the hands of the respondent. But this argument overlooks the respondent's status as an Outlander. When it had the marks they were free reichsmarks and Vorzugssperrguthaben (Altbesitz) marks and were so designated in the invoices and debit advices. It is *these* marks, therefore, which must be converted into dollars, and not the marks which the seller received after the metamorphosis, the latter marks having no external value. If the contention were sound there would have been no necessity for imposing countervailing duties on purchases of German goods with depreciated marks, as was done in *F. W. Woolworth Co.* v. *United States,* 115 Fed. (2d) 348 (Court of Customs and Patent Appeals). See also, 38 Opinions of Attorney General, p. 489, and 39 Opinions of Attorney General, p. 261.

The case of *Edmond Weil, Inc.* v. *Commissioner of Internal Rev.,* 150 Fed. (2d) 950 (C. C. A. 2), is a direct authority on this point. There the taxpayer purchased 50% of the stock of a Brazilian corporation with dollars and later, under a reorganization, his half of the corporate assets was transferred to a Brazilian partnership as a loan in the sum of 750,000 milreis. The result was a gain to the taxpayer. In computing the tax, the Commissioner arrived at a taxable gain of $21,583.24 by applying the official rate of exchange on milreis, .06+, instead of the commercial rate of .05+. The Tax Court, however, took the commer-

cial rate, under which the taxable gain was $14,398.84, and modified the assessment accordingly. *Edmond Weil, Inc.* v. *Commissioner,* CCH 3 TCM 844, 849. On appeal the Circuit Court (p. 951) held that the Tax Court was right.

Further cases in point are *Tillman* v. *Russo Asiatic Bank,* 51 Fed. (2d) 1023 (C. C. A. 2), and *Tillman* v. *National City Bank of New York,* 118 Fed. (2d) 631 (C. C. A. 2), dealing with accounts in Russian rubles; *Steinfink* v. *North German Lloyd S. S. Co.,* 27 N. Y. S. (2d) 918; *Branderbit* v. *Hamburg-American Line,* 31 N. Y. S. (2d) 588; *Strauss* v. *United States Lines Co.,* 42 N. Y. S. (2d) 618, in which passage transactions in German blocked marks were involved; and *Rives* v. *Duke,* 105 U. S. 132, which involved the value of Confederate currency in which two bonds were payable.

On the basis of the selling rates for these marks, namely, .4013 for the free marks, and .031875 for the Altbesitz marks, their total dollar value as of December 16, 1939, was $41,337.62. This constitutes, we submit, the true invoice value of the pips, to which the petitioners' liability should be limited.

We therefore respectfully request this Court to review and determine the questions of foreign exchange dealt with in this point, if a writ of certiorari is granted.

POINT IV.

The questions presented are of general interest and great importance.

The holding of the lower Court as to deviation sets up a doctrine so novel and with such serious implications for ship-owners and protection and indemnity underwriters in general that it cannot be let go unchallenged. Unless it is reversed it might ultimately be held applicable to many

other situations not heretofore classed as deviations. The decision is of such doubtful validity and the question so important and of such general interest that a review thereof by this Court should be had.

The foreign exchange questions, on which the validity of Clause 16 and the determination of invoice value depend, are just as important and of as much general interest as the deviation point. So far as we know, this Court has not yet passed on any transactions involving German blocked marks, and the currency questions here involved are well deserving of review by this Court.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, April 3, 1947.

JOHN W. CRANDALL,
ARTHUR M. BOAL,
Counsel for the Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1207

BLACK DIAMOND LINES, INC. and TAMPA INTER-OCEAN STEAMSHIP COMPANY,

Petitioners (Respondent-Appellant and Claimant-Appellant below),

against

PIONEER IMPORT CORP.,

Respondent (Libelant-Appellee below).

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE C. SPRAGUE,
Counsel for Respondent.

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Statement *

The question raised in the petition herein is merely one of damages, this Court having previously denied certiorari on the merits, 321 U. S. 766. The Courts below assessed the damages on the well established basis of market value in sound condition at destination, the shipment having been a total loss (*The St. Johns N. F. Ship. Corp.* v. *S. A. Companhia*, 263 U. S. 119, 125, and cases cited therein).

The cause presents no reason within Rule 38, paragraph 5, for the issuance of a writ of certiorari. Contrary to petitioners' assertions neither the decision of the District Court (R. 630-638) reported in 64 F. Supp. 529, nor that of the Circuit Court of Appeals (R. 691-694) reported

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* References are indicated as follows: "R" means Record on damages; "T.R." means Record on merits; "B" means white covered book of exhibits.

in 159 F. (2d) 654, is in conflict with applicable decisions of this Court or of another Circuit. No novel questions of federal law were decided below and questions of local law were not involved. The "questions presented" by the petition, "specifications of error to be urged" and "reasons for granting the writ" are not of general interest or unusual importance; they have already been answered by this Court. In fact, one of the most vital issues raised in the petition herein, namely, that the agreement that the pips were to be covered with tarpaulins, was not part of the contract of carriage because not contained in the bill of lading ("questions presented" 6, 7 and 8 at p. 6 of petition; "specifications of error to be urged" 5, 6, 7 and 8 at p. 8 of petition; and "reasons for granting the writ" 7 and 8 at pp. 10-11 of petition) is merely a repetition of the issue raised in the previous petition on the merits dated December 24, 1943 (No. 570, October Term 1943, denied 321 U. S. 766), to which earlier petition I refer at page 12 "questions" 10, at page 14, "specifications" 8, 9 and 10, and at page 16 "reasons" 7 and 8.

Petitioners seek to make up for the lack of merit of the individual "reasons" ascribed for the issuance of the writ by the multitude of such reasons. Actually this was an ordinary cargo damage case where both Courts below found that petitioners had fundamentally departed from the agreed method of transportation by failing to cover the pips with tarpaulins (R. 634, 692), which under well established authority, including the decision of this Court in *The St. Johns N. F. Ship. Corp.* v. *S. A. Companhia,* 263 U. S. 119, constituted a deviation depriving the petitioners of the protection of their bill of lading limitations. After reaching this conclusion, all questions concerning the validity or invalidity of bill of lading clause 16 and the amount in dollars of the invoice value of the pips became moot. This is why the Circuit Court of Appeals made no finding as to the validity of clause 16 of the bill of lading which the District Court had expressly found invalid (R. 630-633).

The Decisions Below

On the merits the District Court, after trial (49 F. Supp. 559), expressly found that respondent's representatives in Rotterdam on shipping the lily of the valley pips (plant life), refrigeration being unavailable, had booked space on S.S. *Lafcomo* in the next coolest place, namely, on the forward deck of the ship, and had expressly stipulated, on the written loading permit upon which the goods were accepted by the ship and which was the proper place for such a notation, that these pips be covered with tarpaulins (Findings 12, 14, 26, T.R. II, pp. 930-931, 934-935). It also found that petitioners had insufficient tarpaulins available to cover these pips and instructed their stevedores not to cover them (Findings 18-20, T.R. II, 932-933), and that as a result the pips were submerged in sea water for considerable periods of time during the voyage (Finding 30, T.R. II, 936-937) by reason of which they became a total loss for which both petitioners were jointly and severally liable to respondent (Conclusion of Law IX, T.R. II, 946). The Circuit Court of Appeals affirmed (138 F. [2d] 907), stating of the decision of the District Judge that it "leaves little for us to add. There is ample evidence to sustain his findings. Upon the finding that there was no agreement by the shipper that the deck cargo need not be covered, the vessel is liable as well as the common carrier. Salt water is obviously harmful to plant life and the finding of negligence in stowage was justified" (id., p. 908). This Court denied certiorari on the merits (321 U. S. 766).

The cause then went to the Commissioner on damages who after hearing testimony filed a report (R. 607) holding, (1) without discussion or statement of reasons, that "it would appear from a reading of the bill of lading [clause 16] that a choice of freight rates was offered to the shipper and * * * is applicable to the present claim" (R. 611); (2)

that the failure to cover the goods with tarpaulins as agreed upon, although resulting in their destruction, was not a deviation merely because "if * * * the ship had encountered different weather conditions the cargo could have arrived in good condition" (R. 611); (3) that under clause 16 of the bill of lading the shipowner was entitled to limitation to the lowest standard of value (R. 611); that the invoice value of the pips (after careful analysis of the testimony concerning German currency control, free reichsmarks and blocked reichsmarks as well as the finding of the District Court) was $76,973.34 (R. 612-615); (4) that the market value of sound refrigerated pips in New York at time of *Lafcomo's* arrival was $22.50 per thousand, making the total market value for the cargo destroyed the sum of $71,212.50, unless there was a difference in value between refrigerated pips and unrefrigerated pips (R. 616); (5) that unrefrigerated pips were not as valuable as refrigerated pips but were worth 20% less (R. 619). He therefor found libelant's damages to be $56,970 with interest from December 16, 1939, and costs (R. 619).

All parties excepted to the Master's report (R. 620-629). The exceptions were argued before Bondy, D. J., who in an opinion (R. 630-638; 64 F. Supp. 529) sustained libelant's exceptions to the report and held (1) that clause 16 of the bill of lading was invalid because it did not afford a choice of rates for these goods (R. 630-633), citing *Kilthau* v. *International Mercantile Marine Co.,* 245 N. Y. 361, and *The Merauke,* 31 F. (2d) 974; (2) that failure to cover the cargo with tarpaulins was a breach, going to the essence of the contract of affreightment, and constituted a deviation nullifying clause 16 even if otherwise valid (R. 633-635), citing *The Sarnia,* 278 F. 459, cert. den. 258 U. S. 625; *The St. Johns N. F.,* 280 F. 553, aff'd 263 U. S. 119; and (3) that the Commissioner having found that the market value in New York of refrigerated pips was $22.50 per thousand "an amount offered for part of the shipment without differentiation as to grade" erred in discounting that value

by 20% in reliance on the testimony of witnesses who based their opinions on a belief that the pips would have arrived not dormant and in a sprouted condition (R. 636-637). The District Court therefor held respondent was entitled to a decree against petitioner Black Diamond Lines, Inc., for $71,212.50 with interest from December 16, 1939, and costs and against petitioner Tampa Inter-Ocean S.S. Co. for $63,250 with interest from December 16, 1939, and costs, petitioner Tampa Inter-Ocean S.S. Co. to have a decree over against petitioner Black Diamond Lines, Inc., for any amount it paid to respondent thereunder (R. 637). A final decree was entered pursuant to said opinion (R. 639-641).

Petitioners appealed from this decree and the Circuit Court of Appeals modified the decree for respondent by reducing the amount to $56,970 with interest from December 16, 1939, and costs on the ground that the finding of the Commissioner that the market value of unrefrigerated pips in New York on December 16, 1939, was 20% less than that of refrigerated pips was "not clearly erroneous [and] the District Court erred in reversing it" (R. 693). The Court also held that appellants by failing to cover the pips with tarpaulins "deviated fundamentally from the agreed method of transportation. They are therefore deprived of the benefit of the limitation clause. *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial do Rio de Janeiro,* 263 U. S. 119; *The Sarnia,* 2 Cir., 278 F. 459, cert. den. *Sarnia S.S. Co.* v. *DeVasconcellos,* 258 U. S. 625" (R. 692). *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha,* 2 Cir., 47 F. (2d) 878, cert. den. 283 U. S. 856, was also cited (R. 692).

The Circuit Court of Appeals made no holding on the question of the validity or invalidity of clause 16 of the bill of lading; that question was moot in view of its deviation holding. It did, however, hold that "the question of sprouting was foreclosed to appellants before the Commissioner and the District Court below", citing *Gaines* v. *Rugg,* 148 U. S. 228; *Skillern's Ex'rs* v. *May's Ex'rs,* 10

U. S. 267, 6 Cranch 267 (R. 693), because of the finding of the Trial Court that "the pips would not have arrived sprouted had they been covered" (R. 692), which finding was "an integral part of the Court's holding on liability" and had been approved on appeal (R. 693).

In view of this latter holding respondent filed a petition in the Circuit Court of Appeals for rehearing or reconsideration of that part of the opinion which provided for the modification of the final decree against appellants by reducing the principal amount from $71,212.50 with interest and costs to $56,970 with interest and costs (R. 695-699). This motion was based upon the fact that the Commissioner, over respondent's objection that he was foreclosed from so doing, had allowed testimony of petitioners' witnesses that the pips would have been damaged by heating and sprouting if they had not been ruined by sea water. The only testimony of any difference between the market value of refrigerated pips and unrefrigerated pips was given by these witnesses and their cross-examination showed that it was based upon their belief that the pips would necessarily have sprouted or heated if imported unrefrigerated. There was therefore no evidence to sustain the Commissioner's finding on this point which was clearly erroneous and the District Court was right in reversing this finding and its decree should not have been modified. The petition for rehearing was denied (R. 700).

Summary of Argument

All four of the points in petitioners' brief hang upon the first point—deviation. Both Courts below, relying upon well established authority, including the decision of this Court in *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial do Rio de Janeiro,* 263 U. S. 119, held that petitioners by stowing the "pips" on deck without covering them with tarpaulins "committed a fundamental breach of the contract of shipment" (R. 634), or "deviated

fundamentally from the agreed method of transportation" (R. 692) which deprived them "of the benefit of the limitation clause" in the bill of lading (R. 634, 692). Unless this concurrent holding, based on a long line of authoritative decisions consistently followed for more than a quarter century, is disapproved, then petitioners' second, third and fourth points are moot.

FIRST POINT

The Courts below were clearly right in holding that petitioners "deviated fundamentally from the agreed method of transportation" which deprived them "of the benefit of the limitation clause" in the bill of lading.

(Answering Petitioner's Point I.)

The findings show beyond doubt (1) that petitioners agreed to stow the pips on deck covered with tarpaulins; (2) that they did not so cover them; and (3) that by reason thereof the pips were submerged in seawater and became a total loss (Findings 12, 14, 16, 18, 19, 25, 30, 33, 35, 38, 54; Conclusion VIII; II T.R. pp. 930-945; confirmed on appeal 138 F. [2d] 907).

Petitioners' argument, in this case where the bill of lading was not negotiated and no third parties are involved, that its contractual liability is to be limited to the provisions of the bill of lading is specious and untenable. The oral agreement for tarpaulin coverage was confirmed by the written loading permit which accompanied the pips when they were accepted by petitioners for shipment, and which specifically provided that they were to be covered. Not only did petitioners accept the pips under this loading permit without making any material change in it but in fact required respondent to prepare and deliver a duplicate thereof (Finding 14, II T.R. 931). It would have been normal and usual practice for respondent to deliver the

bill of lading contemporaneously with the loading permit to petitioners and the facts indicate that this is what occurred although there is no evidence either way, petitioners' proposed finding that it was subsequent to the loading permit having been disallowed. The Trial Judge found that the proper place for the notation of tarpaulin coverage was on the loading permit (Finding 26, II T.R. 934) to which petitioners specified error on appeal (II T.R. 951, Nos. 8, 9 and 10) and were overruled on appeal (138 F. (2d) 907). On previous certiorari on the merits (No. 570, Oct. Term 1943) they raised the same issue but their petition was denied (supra, p. 2).

On the appeal below on the damages petitioners again renewed the argument (brief, p. 13) that they were not liable on any agreement contained in the loading permit but not in the bill of lading and hence that there could be no deviation. The Court, unimpressed with this argument, expressly found deviation (R. 692).

The cases cited by petitioners are not in point. No other document besides the bill of lading was involved in *The Delaware,* 14 Wall. 579. In *The Thames,* 14 Wall. 98, the question was whether the original bill of lading in the hands of the shipper or the ship's copy thereof controlled. The cause below did not involve any attempt to contradict or vary a written contract. There were two written documents, the loading permit and the bill of lading. They supplemented rather than contradicted each other since both provided for stowage on deck. The loading permit detailed the type of protection to be afforded the goods when so stowed on deck, by tarpaulins. The Courts below were right in reading both documents together in determining the contract between the parties.

No question of merger is involved. In *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial do Rio De Janeiro,* 263 U. S. 119, the freight reservation gave the shipowner an option to stow the goods on or under deck; the shipowner later issued a clean bill of lading (importing

stowage under deck) and the Court held it had thereby exercised its option and was guilty of deviation by stowing on deck.

The railroad and express cases cited by petitioners at middle of page 15 of their brief, such as *Davis* v. *Roper Lumber Co.*, 269 U. S. 158; *American Railway Express Company* v. *Levee*, 263 U. S. 19; *Georgia, Florida and Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, are not in point. A doctrine of admiralty law, such as deviation, would have been inapplicable to them and in fact was not even raised.

In *Bank of California N. A.* v. *International Mercantile Marine Co.*, 64 F. (2d) 97, the Circuit Court of Appeals for the Second Circuit, rather reluctantly it would seem, refused to extend the deviation doctrine to a case of unexplained misdelivery of goods by an agent. The case is not in point; nor are those cited at page 15 where claim clauses have been upheld in cases involving unseaworthiness of the vessel or negligence in the care of goods.

There is no particular reason for not allowing a shipowner the benefit of restrictions of liability contained in his contract of carriage where the loss has been due to mere negligence of his servants or the lack of seaworthiness of his ship of which he has had no prior knowledge. There is every reason for not allowing a shipowner the benefit of the restrictions contained in his own contract of carriage where he himself has voluntarily violated the terms thereof in an essential respect, and left the shipowner with unknown risks against which he has not insured. *The Sarnia*, 278 F. 459, cert. den. 258 U. S. 625; *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha*, 47 F. (2d) 878, cert. den. 283 U. S. 856; *The St. Johns N. F. Ship. Corp.* v. *S. A Companhia Geral Commercial do Rio De Janeiro*, 263 U. S. 119.

The decision below was clearly within the ruling of this Court in the case last cited where the contract of carriage imported under deck stowage but the shipowner stowed

the goods on deck and in consequence thereof they were jettisoned in a storm. This Court held the shipowner liable without benefit of his bill of lading restrictions in the following words:

> "By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had been agreed, and thereby directly caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit, and must account for the value at destination" (p. 124).

The District Court below in the cause at bar, citing the above decision of this Court, said:

> "Had the libellant known that the carrier would not stow the goods on the hatches and cover them with tarpaulins, it might have insured against loss from wetting of the pips instead of only against the loss overboard" (R. 635).

Respondent was not late in raising the "deviation theory". Deviation only became material after the merits had been decided and the matter came before the Commissioner on damages. It was raised as soon as it became material, namely, when appellants began to offer expert testimony concerning blocked marks in their attempt to reduce invoice value. The point was argued orally and by brief before the Commissioner, as well as on exceptions to his report in the District Court and again on appeal in the Circuit Court.

SECOND POINT

The District Court's decision that clause 16 of petitioners' bill of lading was invalid for lack of a choice of rates was correct.

(Answering Petitioners' Point II.)

The Circuit Court of Appeals having found that petitioners "deviated fundamentally from the agreed method of transportation [and] are therefore deprived of the benefit of the limitation clause" (R. 692), found it unnecessary to consider whether such limitation clause was valid or invalid. Had the Court found it necessary to consider the holding of the District Court that this clause was invalid, it would undoubtedly have approved since it was based upon its own decision in a similar case, namely, *The Merauke,* 31 F. (2d) 974, which followed *Kilthau* v. *International Mercantile Marine Co.,* 245 N. Y. 361 (R. 632). Had it disagreed with this holding of the District Court it would most certainly have manifested such disagreement.

The facts clearly show that although clause 16 (R. 631) ostensibly offered a choice of rates none in fact was offered because the value of the shipment did not exceed the bill of lading limit of value.

The pertinent provisions of clause 16 are as follows:

> "the carrier's liability for loss of, or delay, or damage to the goods, shall never exceed: (1) when freight is paid or payable on an ad valorem basis, the value thereof declared in writing * * * and inserted herein; (2) in all other cases, the invoice value or $25. per cubic foot or $50. per 100 lbs. or $250. per package, whichever is least; and it is hereby agreed that the value of the goods does not exceed said amount" (R. 672).

The number of packages in the shipment, their weight in kilos and the number of cubic feet of space occupied by them is shown on the face of the bill of lading (T.R. II, p. 878) from which computations are easily made under the four standards specified in the clause. There were 1,927 packages, weighing 107,180 kilos (235,796 pounds) occupying 9,309 cubic feet of space so that the value of the shipment would have been (1) under the $250 per package limitation, $481,750; (2) under the $50 per 100 pounds limitation, $117,898 and (3) under the $25 per cubic foot limitation, $232,725; whereas (4) the invoice value at point of shipment was $76,973.34 as found independently by the District Court (T.R. II, p. 943, Finding 55) and by the Commissioner (R. 615). It therefore could not be, and was not, disputed that the value of the pips did not exceed invoice value. No value was declared; if it had been declared it would unquestionably have been less than that computed by any of the limitations set in clause 16 except invoice value, as to which it would have been approximately the same. Consequently, there was no valid choice of rates offered, because the value of the goods which were agreed to be carried at the regular tariff rate did not exceed any of the limits specified in the bill of lading. *The Merauke,* supra, and *Kilthau,* supra, cases are therefore controlling.

Petitioners' contention (brief, p. 18), citing *People of Illinois* v. *Campbell,* 91 L. Ed. 272, that respondent is estopped from questioning the validity of clause 16 or raising the deviation question after trial, because its counsel requested a final decree for the invoice value of the goods as found and cross assigned error on appeal when its request was denied, is untenable. The District Court (R. 633) pointed this out when the same contention was raised before it on exceptions to the Commissioner's Report:

> "The request was based not upon any admission of fact but upon an erroneous conclusion of law, not binding on any court or on the party by whom made. *Pitcairn* v. *American Refrigerator Transit Co.,* 191 F. 2d 929, 935, cert. den. 308 U. S. 566; *Bierce* v. *Hutchins,* 205 U. S. 340, 347."

THIRD POINT

Assuming but not admitting that the invoice value of the pips is material, then such value is $76,973.34 as found by the Trial Court, affirmed by the Circuit Court of Appeals and found independently by the Commissioner on damages.

(Answering Petitioners' Point III.)

Invoice value of the pips only becomes material in the event (1) that petitioners' failure to cover the shipment with tarpaulins is not a deviation and (2) that clause 16 is valid. Both Courts below held there was a deviation; the District Court also found that clause 16 was invalid though the Circuit Court of Appeals, while affirming with modification found it unnecessary to consider this finding (supra, pp. 5, 11).

Even if invoice value is material the Trial Court in finding 55 determined it as $76,973.34 (T.R. II, 943), which was in effect approved by the Circuit Court of Appeals on the merits when it said of this finding, "All that was determined was the cost price of the pips abroad * * *" (R. 635; cf. 138 F. (2d) 907, 909). The Commissioner on damages independently reached the same conclusion after a careful analysis of the testimony before him including that of the experts on foreign exchange (R. 612-615). In spite of these concurrent findings, and of the probable immateriality of the question, petitioners urge the Court laboriously to re-examine the facts concerning purchase and entry of the goods and the testimony on foreign exchange.

Avoiding detail as much as possible the transaction was as follows: Respondent's entire shipment of 3,165,000 pips was purchased through Eurotank Handels Gesellschaft m.b.H. of Berlin, a German corporation, hereinafter called "Eurotank" (R. 582), payments being made through Reichs-Kredit Gesellschaft Akt of Berlin, hereinafter called

"Bank", half out of respondent's free mark account and half out of a preferential blocked account belonging to respondent's parent corporation, International Mortgage and Investment Corp., hereinafter called "International" (R. 665). This preferential blocked account constituted the proceeds of German mortgages acquired before 1930 by "International" (Ex. 14, R. 657-660). There were seven separately invoiced lots of pips in the shipment and the commercial invoices, consular invoices and debit notes pertaining to each appear in the white book of exhibits referred to as "B" at pages 47 to 73; the custom entries appear in "B" at the pages following 73. The signatures of the officers of "Bank" on the debit notes were verified as genuine by an officer of the National City Bank (R. 74-79). The transaction was approved by permit of German Foreign Exchange Office addressed to "Eurotank", the seller, dated November 15, 1939, entitled "Release of the preferential blocked account of 'International' for the 50% payment for a delivery of 10,000,000 forced lily-of-the-valley germs in a total f.o.b. value of R.M. 600,000" (R. 665-667). The invoices and banking documents show compliance with the conditions contained in this permit. The declarations of respondent filed in the Collector's office at New York substantiate the invoices, debit notes, permit, etc. (R. 658, 663-664).

The experts on foreign exchange testified that the German Foreign Control Act took effect in July, 1931 (R. 383-384) and that thereafter no "auslander", including Germans not living in Germany as well as foreigners, could dispose of funds in Germany that had been acquired prior thereto without a specific license from the Foreign Exchange Office and such accounts became "blocked reichsmark accounts" (R. 386-387, 432-436), but could, however, freely dispose of fresh funds in Germany acquired thereafter, commonly called "free reichsmark accounts" (R. 432-434, 574-580).

The exchange rate of the reichsmark between 1924-1934 was .2381 dollars (R. 388); in 1934 when the United States

went off the gold standard it became .4033 dollars (R. 388), which was the rate proclaimed by the Secretary of the Treasury of the United States effective at the time of the importation in question and upon which the warehouse entries were based (R. 108-112; B, Ex. 27, pp. 77-79, 81, 84-85). The actual exchange rate in the New York market between November 15, 1939, to early December varied from .4010 dollars to .4016 dollars (R. 404).

The categories of German blocked mark credits in effect at the time of the purchase of the pips (November, 1939) are set forth in the Foreign Exchange Law of December 22, 1938, published in the official Reich-Account Gesetzblatt of that date, effective January 1, 1939 (R. 437-438; Ex. 31), under the heading "Sperrguthaben", paragraph 36, Section 1. Of these categories "Vorzugsperrguthaben" ("preferred or preferential blocked credits" colloquially called "altbesitz" or old possession) (R. 438) heads the list as (a). This type of credit had the highest value of any of the categories for use in purchase of merchandise for export (R. 442-445, 468; Ex. 32). This was the type of blocked credit used by respondent under permit of the German Foreign Exchange Office (Ex. 21; R. 665-666) in payment of 50% of the cost price of the pips ("B", Ex. 26, pp. 49, 54, 68, 73), the other 50% being paid in free marks ("B", Ex. 26, pp. 48, 53, 67, 72).

The experts on German foreign exchange control agreed that "Eurotank" who sold these German pips to respondent for export and was paid 50% out of a "vorzugsperrguthaben" account and 50% out of a "free reichsmark" account, received the same type of reichsmarks for the full 100% of the invoice price, all of which were free and without restriction or discount, "the ordinary currency in cash, the currency of the country" (R. 403, 411-413, 448), which it could use without restriction or discount inside Germany for whatever it pleased (453-454). It made no difference to "Eurotank" whether it was paid entirely out of a free reichsmark account or partly out of such an account and partly out of a "vorzugsperrguthaben" account.

The fact that a "vorzugsperrguthaben" account if sold to another "auslander" lost the preferred character which it possessed while in the control of its original holder and became a mere "handelsperrguthaben" credit (R. 414, 445) which could not be used for the purpose of buying goods of German origin for exportation to the United States (R. 445) is immaterial. Respondent did not buy "International's" "vorzugsperrguthaben" account; it obtained the right to use that account because it was "International's" wholly owned subsidiary (R. 414).

Petitioners throughout their brief confuse the issue by treating all types of blocked reichsmark credits as being the same under the colloquial name of "altbesitz mark". The experts on German foreign exchange agreed that there was no such thing as an "altbesitz mark" (R. 415, 440-442) and that respondent's "vorzugsperrguthaben" credit was of much greater value than any of the other types of blocked mark credits (R. 414, 442-443, 466).

Petitioners' entire argument on this point (brief, p. 30) based upon the contention that the reichsmarks paid out of the "vorzugsperrguthaben" account should have been converted at the quotation on handelsperrmarks in November-December, 1939, New York, which it was testified ranged from 2⅞ cents to 3½ cents per mark or an average of $.031875, is clearly fallacious and untenable. Respondent did not buy the "vorzugsperrguthaben" in New York or elsewhere. Moreover, had respondent bought "vorzugsperrguthaben", such credit admittedly would have lost its value by the mere transfer of ownership and could not have been used for the purchase of German pips for exportation to New York (R. 445). Respondent was not required to sacrifice the real value of its "vorzugsperrguthaben" credits by throwing them on the market in New York, stripped of their privileges, when it was in a position to obtain their par value in Germany (where they were located) in exchange for German merchandise for export. The reichsmarks out of respondent's "vorzugsperrguthaben" credit

were actually used at parity for 50% of the purchase price of the pips. The market price of "handelsperrguthaben" in New York is immaterial. The purchase and sale of the pips was purely an inland German transaction, the vendor being a German corporation and the purchase price being paid in German reichsmarks, out of two accounts in a German bank. The cases cited by petitioners are not in point.

FOURTH POINT

The questions presented are not of general interest or great importance. The cause is merely an ordinary cargo damage suit and was decided below in accordance with well established principles previously enunciated by this Court.

FINAL POINT

The petition for writ of certiorari should be denied. If the petition should be granted then respondent begs leave for permission to raise on the argument thereof the question of whether the Circuit Court of Appeals did not err in modifying the decree of the District Court by reducing the damages from $71,212.50 with interest and costs to $56,970 with interest and costs (R. 693-694) and in denying respondent's petition for rehearing on this question (R. 695-700).

Respectfully submitted,

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April 25, 1947.